

Nguyen (Migration) [2019] AATA 6923 (18 October 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Mrs Thi Ngoc Due Nguyen
Mr Minh Tuan Tran
Mr Minh Tien Tran

CASE NUMBER: 1803096

DIBP REFERENCE(S): CLF2013/269377 CLF2017/66603

MEMBER: Christine Kannis

DATE: 18 October 2019

PLACE OF DECISION: Perth

DECISION: The Tribunal affirms the decision not to grant the applicants Partner (Residence) (Class BS) visas.

Statement made on 18 October 2019 at 7:28am

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – bogus document or false or misleading information – statutory declaration by applicant that she was living with sponsor at a particular address – residence history – validly married – relationship ceased and sponsor seeking divorce – sponsor notified Centrelink but applicant did not notify department – credibility – unreliable evidence – applicant’s claim of family violence not considered – anonymous allegations given no weight – no compelling or compassionate circumstances to waive requirements – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5(1), 65, 359AA, 376
Migration Regulations 1994 (Cth), Schedule 2, cl 801.226, Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 1 February 2018 to refuse to grant the applicants Partner (Residence) (Class BS) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named applicant (the applicant) applied for the visa on 3 September 2013 on the basis of her relationship with her sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.801.226 of Schedule 2 to the Migration Regulations 1994 because the delegate found the applicant did not meet public interest criterion (PIC) 4020.
4. A copy of the Decision Record was submitted to the Tribunal by the applicant for the purposes of the review.
5. Prior to the hearing the applicant's representative informed the Tribunal that the applicant's relationship with the sponsor had ceased and that the applicant claimed she had suffered family violence perpetrated by the sponsor.
6. The applicant appeared before the Tribunal on 8 October 2019 to give evidence and present arguments. The Tribunal also received oral evidence from one of the secondary applicants, Mr Minh Tuan Tran. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
7. The applicants were represented in relation to the review by their registered migration agent.
8. At the commencement of the hearing the Tribunal informed the applicant of the existence of a s.376 certificate and explained that the effect of such a certification is that the Tribunal is given discretion whether to disclose the document and/or information covered by the certificate. The Tribunal provided the applicant with a copy of the certificate and informed her it had found the certificate to be valid because it was satisfied the document and/or information had the necessary quality of confidence which meant its release would not be in the public interest. The Tribunal invited the applicant to comment on the validity of the certificate. The applicant made no comment on the validity of the certificate.
9. The information the subject of the certificate included information relevant to the issue of whether the applicant was in a genuine and continuing relationship with the sponsor and the Tribunal advised her that this information would be disclosed during the hearing. The Tribunal noted that the information was also referred to in the delegate's decision in general terms. The gist of the material covered by the certificate was put to the applicant pursuant to the provisions of s. 359AA of the Act, as will be set out below.
10. For the following reasons, the Tribunal has concluded that decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

11. The law

12. The issue in this review is whether the applicant meets PIC 4020 as required by cl.801.226 for the grant of the visa. Broadly speaking this requires that:
- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).
13. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act. In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
14. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
15. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
16. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

17. The delegate's decision

18. The delegate referred to documentation the applicant provided to the Department on 3 February 2016 in which she stated that she and the sponsor lived together at Gossamer Avenue Mirrabooka, Western Australia (Gossamer Avenue). This information was contained in a statutory declaration made by the applicant dated 2 January 2016. A statutory declaration containing similar information made by the sponsor dated 11 January 2016 was also provided to the Department on 3 February 2016. The delegate decided that the applicant provided false and misleading information because on 3 February 2016 she was not living with the sponsor at Gossamer Avenue. In making this determination the delegate took into account, among other things, Departmental movement checks and Department of Human Services- Centrelink (Centrelink) records.

19. Information provided prior to the hearing

20. Prior to the hearing the applicant's representative provided a written submission which contained the following information:

- The applicant arrived in Australia on 27 December 2012. At that time the sponsor was receiving treatment under a seven month program for Hepatitis C. He had been bedridden and was cared for by a carer at shared accommodation in Alexander Drive Dianella, Western Australia (Alexander Drive). For these reasons, on her arrival in Australia, the applicant resided temporarily with her brother at Apple Blossom Drive Mirrabooka, Western Australia (Apple Blossom Drive).
- Pending completion of the sponsor's treatment program the applicant went to Alexander Drive on a daily basis to care for him and the sponsor occasionally went to Apple Blossom Drive in a wheelchair.
- In April 2013 the sponsor rented Gossamer Avenue and the applicants moved in to live with him.
- The applicant and the sponsor were married on 26 June 2013.
- The sponsor had been on a Homeswest waiting list for five years when in July 2013 he was offered a three bedroom unit. Homeswest subsequently revoked the offer because the applicant and her sons were not Australian permanent residents.
- In January 2014 Homeswest offered the sponsor a one bedroom unit however after two days he gave the unit back and returned to live with the applicant at Gossamer Avenue.
- In June 2014 Homeswest offered the sponsor a unit at Weaponess Road Scarborough, Western Australia (Weaponess Road). He accepted the unit because he believed the applicant would soon be granted a permanent visa. He also accepted the unit to give his children and grandchildren a place to stay because his daughters were homeless, had substance abuse issues and were involved in criminal activities. On paper he was living at Weaponess Road but still spent most of his time at Gossamer Avenue.
- Police were constantly at his door at Weaponess Road. This was the main reason the applicant could not live with the sponsor on a permanent basis. As a result, the sponsor had two addresses.
- The applicant's relationship with the sponsor has now broken down due to domestic violence.

21. Prior to the hearing the applicant's representative provided the Tribunal with consultation notes made by the sponsor's doctor which recorded the following visits or contacts:
- On 8 January 2013 the sponsor reported that he felt a bit dizzy walking, that he had had a tooth extracted on the previous day and that he was moving out that day to stay with a friend.
 - On 5 February 2013 the sponsor reported that he was now living with a friend and he would be moving to shared accommodation in Ocean Reef the following month.
 - On 26 February 2013 the sponsor said he was planning to go with a friend to Cairns for a couple of weeks and wanted a letter for the airline. He reported that he was living in a house with eight cats and would hopefully have new accommodation on his return.
 - On 14 April 2013 the doctor recorded that the sponsor had called her from the Northern Territory on 26 March 2013 and said he would be returning to Perth on Sunday.

Evidence at hearing

22. When asked about the date and circumstances of her separation from the sponsor the applicant initially told the Tribunal that she has had no contact with the sponsor since February 2019. At that time he asked her leave his house and said he didn't want to see her again. She said prior to February 2019 they still saw each other and she went to his house sometimes but he was busy with work. Later in the hearing the applicant said she has had two or three phone calls with the sponsor since February 2019. In April 2019 he told her he wanted to apply to court for a divorce.
23. The Tribunal directed the applicant to the declaration (signed on 30 August 2013) she made when she submitted her application form that she would inform the Department if her relationship with her partner breaks down or ends in divorce or separation before the application is decided. In response to the Tribunal asking whether she had complied with her notification obligation she said she had not informed the Department but she had informed her representative's father and asked him to complete the paperwork. She said in her heart she still wanted to be with the sponsor. Neither of these factors justifies the failure to comply with her notification obligation.
24. The applicant told the Tribunal that after she arrived in Australia she lived at Apple Blossom Drive until she moved to Gossamer Avenue in July 2013. She said this was a period of five months however the Tribunal notes 27 December 2012 to July 2013 is longer than five months. In response to the Tribunal asking where the sponsor lived when she was living at Apple Blossom Drive the applicant said he was living in a shared house with a friend at Alexander Drive. She said when she first arrived he was very unwell and she visited him every day for five months. She said he was wheelchair bound but sometimes when his health was okay he visited her brother at Apple Blossom Drive. She said she was not allowed to stay with him because of his illness and because he had to remain isolated.
25. Noting the applicant's repeated and unequivocal evidence that she visited the sponsor daily at Alexander Drive from the time of her arrival in Australia until July 2013, the Tribunal put the consultation notes referred to in paragraph 18 to her for her comment or response. The Tribunal put to the applicant that the sponsor appeared to change his accommodation in January 2013 and appeared to be mobile and able to attend the dentist and travel interstate. When asked to comment on the above matters the applicant said she had no response other than to say the sponsor moved in to live with a friend at Alexander Drive on 1 January 2013.

The Tribunal noted that earlier in the hearing her evidence was that the sponsor was living there when she arrived in Australia on 27 December 2012.

26. The applicant told the Tribunal that she and the sponsor moved into Gossamer Avenue in July 2013. The Tribunal referred the applicant to a Residential Tenancy Agreement for Gossamer Avenue which named the applicant and the sponsor as the tenants for a period commencing on 10 June 2013. The document was signed by the Owner and the applicant only. The applicant was unable to provide the reason the sponsor had not signed the document.
27. Utilising the s.359AA procedure the Tribunal put the sponsor's following Centrelink records and Incoming passenger cards to the applicant for her comment or response:
 - The sponsor's address for Centrelink purposes prior to 5 July 2013 was West Coast Highway and his Incoming passenger cards prior to July 2013 also showed West Coast Highway as his intended address in Australia.
 - On 5 July 2013 the sponsor notified Centrelink of his change of address to Gossamer Avenue and his Incoming passenger cards during the period from July 2013 to July 2014 showed his intended address in Australia as Gossamer Avenue.
 - On 1 July 2014 the sponsor notified Centrelink of his change of address to Weaponess Road and his Incoming passenger cards in 2015, 2016 and 2017 showed his intended address in Australia as Weaponess Road.
28. The Tribunal put to the applicant that the sponsor's addresses as notified by him to Centrelink were at all relevant times consistent with his intended addresses in Australia as indicated in his Incoming passenger cards. Despite the applicant's representative contention in the written submission that the sponsor had two addresses from mid-2014, he notified Centrelink of a change of address to Weaponess Road from 1 July 2014 and consistently provided this address in Incoming passenger in 2015, 2016 and 2017. When asked for her response to the information the sponsor provided to Centrelink and in his Incoming passenger cards the applicant said she had no comment.
29. The Tribunal acknowledges that these matters, namely the applicant's failure to comply with her notification obligation, her evidence that she visited the sponsor daily at Alexander Drive from 27 December 2012 to July 2014 and the sponsor's addresses for Centrelink and Incoming passenger card purposes, do not establish non-compliance with PIC 4020 but considers they are relevant to the assessment of the applicant's credibility and the veracity of her evidence. The Tribunal formed the view that the applicant is not a credible witness and that her evidence is unreliable. The Tribunal has formed the view that the applicant is willing deliberately to withhold information if she believes it would be adverse to her visa application. She has provided oral evidence to the Tribunal which is inconsistent with the doctor's consultation notes, declined to comment on relevant information and failed to notify the Department of the breakdown of her relationship with the sponsor or her separation from him, which even on her evidence occurred in February 2019.
30. The applicant told the Tribunal that in mid-2014 the sponsor accepted Weaponess Road when it was offered by Homeswest. She said he accepted it so that his children could live there and he lived with her at Gossamer Avenue most of the time. When asked how many days a week he lived at Gossamer Avenue and how many days he lived at Weaponess Road, the applicant initially said he was at Gossamer Avenue five days a week and at Weaponess Road two days a week. Later in the hearing she said it was too difficult to estimate how often he stayed at Gossamer Avenue and how often he stayed at Weaponess Road because it depended on how problematic his daughters were being. She said he was

going to and fro between the residences until January or February 2016 after which he visited her monthly or every two months depending on his mental health and his daughters' problems.

31. The Tribunal referred the applicant to the statutory declarations made by her dated 2 January 2016 and made by the sponsor dated 11 January 2016. The documents were written in the same handwriting and the applicant said her previous representative, Mr Khoi, had told her what to write in both documents. Given that the sponsor can read and write English the Tribunal queried the reason she had written the statutory declaration for him. She said the Department had only given them four weeks within which to provide information and the sponsor was living in Queensland at the time. She had to ask him to return to Perth to sign the statutory declaration. Her response did not adequately explain the reason the sponsor did not write his own statutory declaration.
32. In the statutory declarations the applicant and the sponsor stated they lived together and shared their income for payment of expenses such as food and rent. The Tribunal asked the applicant about the financial arrangements for payment of expenses such as utilities, rent and food for Gossamer Avenue. She said her two children were both working and they helped with payment of expenses. The Tribunal asked the applicant a number of times to explain how she and sponsor were sharing expenses at the time of making the statutory declarations in January 2016 however her response was that he had to pay for expenses at his other place and she provided no further information.
33. The Tribunal notes that in the applicant's oral evidence and in the applicant's representative's written submission there was a suggestion that Mr Khoi was responsible for the information provided to the Department on 3 February 2016. In the Tribunal's view it was the applicant's responsibility to ensure that the information was accurate and correct before signing the statutory declaration.
34. The Tribunal was provided with various items of correspondence including but not limited to a Water Corporation bill dated 2 October 2017 addressed to the applicant and the sponsor at Gossamer Avenue, a RAC letter dated 14 November 2017 addressed to the applicant and the sponsor at Gossamer Avenue and an Australia Post redirection letter dated 27 July 2017 addressed to the sponsor at Gossamer Avenue (the correspondence).
35. The information covered by the s.376 certificate included allegations made to the Department that the applicant's marriage to the sponsor was not genuine. Utilising the s.359AA procedure the Tribunal put to the applicant that five allegations that the sponsor had been deceived for the purposes of enabling her and her sons to gain Australian citizenship had been received between 2013 and 2017. The Tribunal put to the applicant that the informant said after the wedding the applicant and her sons left with her family and the sponsor did not see them for two weeks and that when the sponsor said he would send her back to Vietnam her family told him he would be charged with fraud. He left Perth and on his return he was given a separate room and he had to do his own washing. The applicant's response was that she lived with the sponsor and did not live separately.
36. The Tribunal did not give any weight to the allegations and noted they were made anonymously.
37. The Tribunal noted that Centrelink records show the sponsor notified a change in his relationship status from partnered to single on 29 February 2016. The applicant told the Tribunal she did not know about this at the time but later found out.

38. Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

39. The applicant's evidence was that the sponsor lived with her at Gossamer Avenue from July 2013 to mid-2014 after which he lived at both Gossamer Avenue and Weaponess Road. Initially she said he lived with her most of the time but later said he was coming and going and she was not able to say how often he was at each residence. Her evidence was that this ceased in January or February 2016.
40. The Tribunal accepts that the applicant and the sponsor lived at Gossamer Avenue from July 2013 until mid-2014. The Tribunal finds that from 1 July 2014 the sponsor lived at Weaponess Road and did not live with the applicant at Gossamer Avenue. The evidence pointing towards this conclusion is the sponsor's Centrelink records which show his history of notifying changes of address and the dates of these changes were consistent with the information he provided in Incoming passenger cards. The information provided to Centrelink and in the Incoming passenger cards was information provided by the sponsor himself. The Tribunal also notes that the applicant nominated January or February 2016 as the date any form of cohabitation ceased. Given that the delegate found the false and misleading information was provided on 3 February 2016 the Tribunal takes the view that the applicant nominated January or February 2016 in order to contend information provided on 3 February 2016 was not false and misleading at the time it was given. When asked what had occurred in January or February 2016 to cause the cessation of any cohabitation the applicant referred to the sponsor's family problems and offered no other explanation.
41. The evidence which might point to the sponsor living with the applicant at Gossamer Avenue after mid-2014 is the correspondence provided, the statutory declarations made by the applicant and the sponsor dated in January 2016 and the applicant's oral evidence.
42. In relation to the correspondence the Tribunal notes the applicant's evidence was that the sponsor remained living at Gossamer Avenue until some of the time up to January or February 2016 and accordingly finds this evidence does not establish the sponsor's residence at Gossamer Avenue. In the Tribunal's view the correspondence addressed to the sponsor at Gossamer Avenue in 2017 clearly does not necessarily establish that he resided at the address at any particular time or, indeed that he resided there at all. The Tribunal also notes this type of evidence can be obtained without difficulty. Accordingly the Tribunal does not place any weight on the correspondence addressed to the sponsor at Gossamer Avenue after 1 July 2014.
43. The Tribunal does not accept that the applicant has provided truthful evidence in her statutory declaration. For the reasons previously stated the Tribunal has formed the view that her evidence is unreliable and that she is willing to withhold information she believes would be adverse to her visa application. Further, when asked she was unable to explain how she and the sponsor shared the household expenses referred to in her statutory declaration. Given that she contended the sponsor was, at least for part of the time, living at Gossamer Avenue and had been since July 2013 the Tribunal would expect her to be able to provide some evidence about shared expenses. The Tribunal asked her about payment of utilities, food and rent however her response was that the sponsor had expenses to pay at the other place. In relation to the sponsor's statutory declaration, the Tribunal makes no findings as he did not attend the hearing and the Tribunal was unable to test this evidence.
44. In relation to the applicant's oral evidence, as previously stated, the Tribunal did not find her to be a reliable witness. The Tribunal did not accept her evidence regarding her daily visits to the sponsor at Alexander Drive in the five months after she arrived in Australia. The sponsor's doctor's consultation notes, which the Tribunal accepts as correct and which were provided by the applicant, demonstrate that the sponsor changed address and travelled interstate during the period the applicant contended she visited him daily at Alexander Drive. Given the unreliability of her evidence to the Tribunal regarding this matter and the Tribunal's concerns with respect to her other oral evidence as noted above, the Tribunal does not

accept her oral testimony that the sponsor lived with her at Gossamer Avenue until January or February 2016.

45. In a written submission the applicant's representative said the applicant's statutory declaration stated that she and the sponsor had never lived separately and apart on a permanent basis. The applicant's statutory declaration stated "we live together".
46. The Tribunal finds that there is information that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal or a relevant assessing authority, information that is false or misleading in a material particular in relation to the present partner visa application. The Tribunal finds the information that the applicant and the sponsor were living together at Gossamer Avenue on 3 February 2016 was purposefully false and misleading and intended to satisfy the definition of spouse under the Act.
47. The Tribunal decided that the applicant did not meet PIC 4020(1).

Should the requirements of cl.4020(1) be waived?

48. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
49. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
50. The Tribunal has had regard to Department's procedural guidelines (PAM3).
51. The applicant did not contend that there are any compelling reasons that affect the interests of Australia.
52. The guidelines suggest that circumstances for consideration must be of compassionate or compelling nature in the way they affect the Australian citizen, permanent resident, or eligible New Zealand citizen. The guidelines further suggest that to waive the requirements of any or all of PIC 4020(1)(a), 4020(1)(b) and 4020(2), the applicant's claims must have a compelling or compassionate element particular to that individual case that are beyond those usually present in that visa caseload.
53. Under policy, the types of circumstances that may involve compelling or compassionate reasons for waiving the requirements of PIC 4020 include, although not exhaustive:
 - Family reasons (for example, unexpected serious or fatal family situations over which the applicant had no control, such as the incapacitation or death of a partner or child or another member of the family unit);
 - That family members in Australia would be left without financial or emotional support; and

- A parent in Australia would be separated from their child (for example, if the child was removed with their non-resident parent and would therefore be subject to an exclusion period).

54. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
55. In response to the Tribunal asking the applicant whether there are compassionate or compelling circumstances in her case she said she had experienced a broken marriage in Vietnam. She said the sponsor is a good man however he is not fortunate because he does not have a good family or good position in the community. She said she would like to work things out with the sponsor. The applicant said she did not have high level of education in Vietnam and her English is limited.
56. Mr Minh Tuan Tran told the Tribunal that the statutory declaration made by the sponsor in January 2016 had to be provided within three weeks of the Department's request. He said the sponsor was in Darwin at the time and Mr Khoi assisted the applicant with the paperwork. Mr Minh Tuan Tran said it had not been easy for his mother to live with the sponsor because he sometimes yelled at her, smashed things in the house and threatened to send her back to Vietnam. He said his mother had seen a psychologist. He said they have been in Australia a long time and if they have to return to Vietnam they will have nothing and it will be difficult to start from the beginning.
57. Neither the applicant nor her representative raised the sponsor's wellbeing in support of waiver with the Tribunal. However the Tribunal noted that in a written submission received prior to the hearing the applicant's representative said the refusal of the visa would affect all aspects of the sponsor's life and referred to "physical, mental and financial" aspects if he were to remain in Australia without the applicant or if he travelled to Vietnam to live with her. The applicant's representative submitted that the compassionate or compelling circumstances must be assessed at the time the false and misleading information was found to be given. The Tribunal rejects this submission. Clause 4020(4) does not restrict the consideration of waiver to a limited time period and the Tribunal is not aware of any authority for such an interpretation.
58. No evidence was provided to substantiate the claim that the sponsor would be affected in any way by the refusal of the visa and the applicant departing Australia. The Tribunal notes the evidence was that he is seeking a divorce.
59. The Tribunal decided that there are no compassionate or compelling circumstances in the present case. Having found that there are no compassionate or compelling circumstances in this case the Tribunal did not need to determine whether it should exercise its discretion to waive the requirements of PIC 4020(1).
60. The Tribunal decided the requirements of PIC 4020(1) should not be waived.
61. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.801.226 and therefore does not satisfy the criteria for the grant of the visa.
62. For the reasons above, the secondary applicants do not satisfy the criteria for the grant of the visa.

DECISION

63. The Tribunal affirms the decision not to grant the applicants Partner (Residence) (Class BS) visas.

Christine Kannis
Member

ATTACHMENT - Extract from Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...